

Sentencing Memorandum

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November 7, 2014

By ECF and U.S.P.S.

Hon. Ronnie Abrams
United States District Court
Southern District of New York
40 Foley Square
New York, New York 10007

Re: United States v. Amnon Filippi
1:12 Cr. 640-03 (RA)

Dear Judge Abrams,

I represent Amnon Filippi in the above-referenced matter. Mr. Filippi is presently scheduled for sentencing before your Honor on November 20, 2014, at 10:30 a.m., pursuant to his conviction of one count of Conspiracy to Distribute and Possess with Intent to Distribute Marijuana, and one count of the underlying substantive offense of Distribution and Possession with Intent to Distribute Marijuana, both in violation of 21 U.S.C. § 841(b)(1)(B).

This letter is submitted in support of Mr. Filippi's request for a sentence of five years' imprisonment, to be followed by a reasonable period of supervised release, and a mandatory assessment of \$200. Mr. Filippi violated both New York State and federal law by engaging in the charged conduct,¹ and it is conceded that he is therefore deserving of some degree of punishment from this Court. However, for the reasons provided below, it is submitted that the Probation Department's advisory Federal Sentencing Guidelines calculation, even if accurate, would call for a range of custodial sentences that would be

¹ Mr. Filippi has not exhausted his legal appeals in this case, and therefore his guilt as to the charged offenses will be presumed herein for the purposes of this sentencing submission only.

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far "greater than necessary" to promote the goals and purposes of sentencing enumerated under 18 U.S.C. § 3553(a)(2).

Furthermore, while the requested sentence accounts for the fact that this Court is bound by the mandatory minimum sentence of five years' incarceration provided under § 841(b)(1)(B), it is submitted that the application of this harsh statutory custodial sentence will constitute a needlessly cruel and (in light of the recent dramatic nationwide social and legal advancements towards decriminalization, legalization, taxation, and regulation of marijuana-related activities) soon-to-be unusual punishment.² Indeed, none of the legitimate goals and purposes of criminal sentencing enumerated under § 3553(a)(2) will be advanced by the imposition of a half-decade or more of imprisonment in this case, and there are other, much more effective measures that--but for the requirements of the charged statute--could have promoted respect for the law and appropriately punished Mr. Filippi for his offense conduct. Therefore, because the current state of the law does not allow for a sentence below five years' incarceration, Mr. Filippi respectfully requests that the Court impose the required mandatory minimum sentence in recognition of the fact that any greater penalty would be highly disproportionate to his offense and would fail to account for his fundamentally decent character and the other factors relevant to criminal sentencing under § 3553(a).

I. The Pre-Sentence Report and the Advisory Federal Sentencing Guidelines Calculation

Mr. Filippi and I have read the preliminary Pre-Sentence Report [PSR] prepared by U.S.P.O. Smyla Jones, and there are several factual errors therein to which Mr. Filippi hereby objects. Several of these objections were sent to the Probation Office on October 20, 2014, and despite numerous telephone calls

² See generally Graham v. Florida, 560 U.S. 48, 58 (2010) (noting that the Eighth Amendment prohibition against cruel and unusual punishments requires examination of "the evolving standards of decency that mark the progress of a maturing society," and that while "[t]he standard of extreme cruelty . . . remains the same . . . its applicability must change as the basic mores of society change.") (quoting Kennedy v. Louisiana, 554 U.S. 407, 419 (2008), and Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

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from my office requesting a response from Probation about these matters, I have yet to receive a final PSR that accounts for, responds to, or even acknowledges these objections.

First, page two of the PSR erroneously states that Mr. Filippi was subject to home detention and electronic monitoring conditions from the time his October 23, 2012 release on bail until bail was revoked upon his conviction. However, this is not the case. A little over two weeks after his arrest and release on bail, Magistrate Judge Andrew J. Peck modified Mr. Filippi's bail to permit him to travel out of state to participate in professional poker tournaments, and at that time his electronic monitoring bracelet was removed with the consent of the Office of Pretrial Services. During the pendency of this case, Mr. Filippi regularly traveled to various out-of-state poker tournaments with the Court's permission and on the government's consent, and there were never any problems whatsoever with his compliance with his conditions of pre-trial release.

Second, the PSR states at paragraph 72 that Mr. Filippi was living in Yonkers at the time of his arrest. However, Mr. Filippi and his wife Karen moved to Yonkers in March of this year, and--as the Court may recall from testimony given at trial--they were living in Manhattan at the time of his arrest.

Third, with respect to the Probation Office's Guidelines calculation, the PSR states that "[t]he government [has] advised that [Mr. Filippi] is responsible for between 800 and 1,000 marijuana plants," which, if true, would be equivalent to 80 to 100 kilograms of marijuana pursuant to Comment E to the Drug Equivalency Table at U.S.S.G. § 2D1.1(c). However, there is not a sufficient basis in fact for holding Mr. Filippi responsible for such a high amount of marijuana. The Homeland Security Investigation (HSI) agents who recovered marijuana from the grow house on Timpson Place in the Bronx claimed to have recovered 433 plants. The only other evidence presented at trial as to the amount of marijuana plants allegedly involved in the charged offense came either from Jorge Parra, an inherently unreliable witness who vaguely estimated the amount of plants that he claimed were involved in another grow house north of New York

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City and during a prior growing period in the Timpson Place warehouse, and Renso Sosa, who did not have sufficient information upon which any reliable estimation of the amount of marijuana involved could be reliably made. See July 23, 2014 Tr. 443 (Mr. Parra testified that he estimates that "approximately about 80 to 100 plants" were in the grow house upstate); July 30, 2014 Tr. 986 (Mr. Parra testified that the "first harvest" from the Timpson Place warehouse yielded "approximately 30 pounds."). Even if Mr. Parra's recalled estimations as to the amounts of plants or weights allegedly involved in the offense were to be considered reliable, the total amount of actual marijuana involved (including the 433 plants recovered by HIS) would still be far less than "between 800 and 1,000 marijuana plants," or the corresponding weight equivalency on which the Probation Office and the government appear to rely. Without some basis in fact or evidence beyond a cooperating witness's ballparked recollections as to the amounts of plants he claims were involved in the charged offense, Mr. Filippi should not be held responsible for more than the 433 plants recovered during the raid of the Timpson Place warehouse. Therefore, under § 2D1.1(c), Mr. Filippi's base offense level under the recently-amended Guidelines is 18.

Together with a two-level increase for maintaining a premises for the purpose of manufacturing or distributing a controlled substance, pursuant to § 2D1.1(b)(12), and a four-level increase under § 3B1.1(a) in connection with his role as an organizer or leader of criminal activity that involved five or more participants, Mr. Filippi's total offense level is 24. Combined with a Criminal History Category of I, the Guidelines call for a sentence of 51 to 63 months' imprisonment, four years to life supervised release, and a fine of \$10,000 to \$100,000.³

³ As the PSR notes at ¶ 82, Mr. Filippi has no assets and is approximately \$300,000 in debt to his friends and his legal counsel. Therefore, he clearly is unable to pay a fine. Furthermore, with respect to the issue of forfeiture, there was no evidence presented at trial as to any profits or proceeds that Mr. Filippi or his co-defendants may have received in connection with the charged offense. With respect to the approximately \$60,000 found in Mr. Filippi's home at the time of his arrest, the government stipulated at trial that Mr. Filippi had won \$191,646 in prize money at the World Series of Poker soon before his arrest, and that he had elected to receive \$141,6456 of that money in cash. There is no evidence at all that the money found in his home at the time of his arrest was from any other source. [Aug. 5, 2014 Tr. 1581.]

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The applicable statutory provisions provide for a minimum sentence of five years' imprisonment, to be followed by a minimum of four years' supervised release, and a maximum fine of \$5,000,000. 21 U.S.C. § 841(b)(1)(B).

For some reason, the Probation Office's Guidelines calculation includes an additional two-level increase for the commission of a narcotics offense "as part of a pattern of criminal conduct engaged in as a livelihood," pursuant to § 2D1.1(b)(14). However, as was pointed out in my office's objections to the preliminary PSR, there is simply no basis whatsoever, aside from rank and uninformed speculation, for the inclusion of this offense-level increase. Under the Application Notes to § 4B1.3 (which is explicitly referred to in the Application notes to § 2D1.1(b)(14)(E)), the term "engaged in as a livelihood" means that:

- (A) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law; and
- (B) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period[.]

There is simply no evidence in the record, and there have never been any allegations made by the government, that either--let alone both--of these conditions are applicable to Mr. Filippi. Therefore, unless the Probation Office knows something about this case that neither the government nor Mr. Filippi are aware of with respect to his income and his livelihood, this offense level increase should absolutely not have been included in the PSR, and certainly not after its complete lack of an adequate factual underpinning had been pointed out through the formal objections sent by my office on October 20. Offense-level calculations by the Probation Office have the potential to increase the amount of time an individual will spend in federal prison, and in the future it is hoped that such *sua sponte* assumptions of unproven facts will not be imagined by the Probation Office out of thin air.

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II. The Nature and Circumstances of the Offense and Mr. Filippi's Post-Offense Conduct

Because the facts and circumstances of this case were the subject of two jury trials before this Court, this letter will not detail those facts in great detail. However, it bears emphasizing that marijuana cultivation consisted of the entirety of Mr. Filippi's offense conduct. No other types of narcotics were involved; no weapons whatsoever were possessed by Mr. Filippi or anyone else who was allegedly involved in the charged offense; no violence was committed, and no threats of violence were ever made in the course of the offense; and there was no connection to or involvement with large-scale criminal networks, gangs, or cartels. Mr. Filippi's offense involved local marijuana growing, and nothing else.

From the time of his release on bail in October of 2012 until his conviction earlier this year, Mr. Filippi was at all times in full compliance with his conditions of release, and he was repeatedly granted leave by this Court to travel the country to participate in poker tournaments. He never sought to escape prosecution or to obstruct justice or hinder the government's investigation and prosecution of him and/or his co-defendants' in any way. Along similar lines, it should also be noted that Mr. Filippi served a term of three years' supervised release after his 1996 conviction, and he never once violated his terms of release relating to that case.

III. Mr. Filippi's Background and Personal History

Amnon Filippi was born in Manhattan in 1969 to Evelyn and Joel Filippi. As the youngest of three children, Amnon was raised in a supportive and close-knit home. After graduating from Yeshiva High School, Amnon lived in Tel Aviv for a year before returning to New York City, where he continued to live until earlier this year, when he and his wife Karen moved to Yonkers. Amnon attended Queens College for two years, and for much of his adult life he has made his living by playing poker in tournaments around the country.

In their letters to this Court, twenty of which are attached hereto under Exhibit A, those who know Amnon best

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describe him as an extremely kind, supportive, generous, and warm person. The overwhelming majority of these letters are from people who have known Amnon for many years and who have become very familiar with him and can attest to his overall character and his fundamentally decent nature.

For example, in the course of his work traveling the country and playing in poker tournaments, Amnon has come to know Justin Tran, another professional poker player who recalls how Amnon went out of his way to help him in the early stages of his poker playing career. John Hanson, another professional poker player who has come to be close friends with Amnon over the last decade, similarly describes Amnon as an ethical and highly-respected person in the poker playing world who "never lets his competitive spirit trump his sense of fairness and basic goodness."

People who have known Amnon since he was a small child describe him in similar terms. Anita Davis, Amnon's elementary school teacher who has known him and his family since the 1970's, remembers him as a "sweet, sincere, kind [and] helpful child," who has remained "an integral part of his family" and someone who "has so much good to contribute to society." Juda Engelmayer, who has known Amnon since they met in the fifth grade, states that there "[t]here are few more loyal, more appreciative and more willing to help than he[.]"

A broad judgment of Amnon's character and the formulation of a just punishment in this case requires more than a simple examination of the extent of his offense conduct, and whatever one may think of poker playing or marijuana use as *malum prohibitum* vices, his involvement in these activities simply cannot be said to indicate a broader criminal, predatory, or anti-social personality. The letters quoted above are representative of those which are attached hereto under Exhibit A and of the many other letters which have been received by my office from people who wished to express their support for Mr. Filippi as he is sentenced by this Court. In each of these letters there is a common theme of Amnon's fundamental kindness and generosity, which he has consistently exhibited towards others for his entire life.

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IV. 18 U.S.C. § 3553(a): The Guidelines, the Statutory Minimum, and the Goals and Purposes of Criminal Sentencing

Pursuant to specific statutory direction, criminal sentences should be "sufficient, but not greater than necessary" to advance the goals and purposes of criminal sentencing enumerated under 18 U.S.C. § 3553(a)(2). The effect of this "overarching provision," Kimbrough v. United States, 552 U.S. 85, 101 (2007), is to ensure that Courts impose sentences in recognition of the fact that the Guidelines are a "marker on the path toward a reasonable sentence," but are "no longer necessarily the ultimate destination on that path," United States v. Jasper, 2005 WL 2414547, at *6 (S.D.N.Y. 2005). See also United States v. Dorvee, 616 F.3d at 182 ("Even where a district court has properly calculated the Guidelines, it may not presume that a Guidelines sentence is reasonable for any particular defendant, and accordingly, must conduct its own independent review of the § 3553(a) sentencing factors.").

The Guidelines in this case call for a range of sentences (51 to 63 months' imprisonment) that largely falls below the statutory threshold of five years. On the other hand, the Probation Office's proffered Guidelines calculation (calling for a range of 97 to 121 months' imprisonment) would call for a total offense level that is even more excessively punitive and counterproductive than the required statutory punishment. Indeed, it should be noted that the disproportionate range of punishments set forth in the PSR drafts received by defense counsel thus far would assign Mr. Filippi an offense level (30) that is be higher than the base offense levels applicable to Voluntary Manslaughter (§ 2A1.3), Aggravated Assault (§ 2A2.2), Burglary (§ 2B2.1), Robbery (§ 2B3.1) and crimes involving Peonage, Involuntary Servitude, Slave Trade, and Child Soldiers (§ 2H4.1), among others. Regardless of whether the Probation Office's calculation is adopted by this Court, it is submitted that any sentencing range calling for more prison time than that required by the mandatory minimum would be highly disproportionate to Mr. Filippi's offense conduct and would fail to provide any benefit whatsoever to society, the government, or to Mr. Filippi and his family.

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Furthermore, while the tide is turning across the United States towards a more rational and less vindictive approach to marijuana prosecutions, the vestigial federal drug sentencing laws remain applicable to Mr. Filippi, and the statute under which he was charged precludes this Court from imposing a sentence that fully complies with the 18 U.S.C. § 3553(a) directive that criminal sentences should not be greater than necessary. In light of the alternative available means of seeking punishment or promoting criminal deterrence, it is contended that the government's decision to seek a conviction under a statute requiring a half-decade of incarceration in this case will do absolutely nothing to advance the legitimate goals and purposes of criminal sentencing.

First, a harsh period of imprisonment will not promote respect for the law. The recreational use of marijuana, along with the manufacture and distribution thereof, is legal in Colorado and Washington state, and on Tuesday of this week voters in Alaska, Oregon, and Washington D.C. have also voted to legalize recreational marijuana (to varying extents), with many more states likely to enact similar reforms through the 2016 elections and beyond.⁴ Furthermore, medical marijuana has been legalized or decriminalized in New York, California and at least 21 other states.⁵ The fact that the Department of Justice has declined to pursue criminal prosecutions for marijuana-related violations of federal law in states that have legalized and regulated the manufacture and distribution of marijuana (whether

⁴ See Chicago Tribune, Voters Back Legal Marijuana in Oregon, Alaska, Washington D.C., Chicago Tribune (Nov. 5, 2014) ("The Oregon and Alaska measures w[ill] legalize recreational pot use and usher in a network of retail pot shops similar to those operating in Washington state and Colorado . . . A less far-reaching proposal in the District of Columbia to allow marijuana possession but not retail sales won nearly 65 percent of the vote with all precincts reporting[.]").

⁵ See generally National Conference of State Legislatures, State Medical Marijuana Laws, Oct. 20, 2014, available at <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>. See also John Leland and Mosi Secret, For Pot Inc., the Rush to Cash In Is Underway, N.Y. Times (Oct. 31, 2014) ("Under New York's law, licensed companies will grow and sell their own product, from 'seed to sale.' . . . [and] New York's health commissioner will set the price of the drug, probably based on the street value.").

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medical or recreational)⁶ indicates that either (1) the government no longer credits the outmoded and outlandish claims about the ostensible dramatic social harms attributable to marijuana usage; or (2) the government is utterly abandoning its responsibility to protect people in certain states from such harms. Either way, the imposition of harsh prison sentences for activities that are legal and no longer subject to federal prosecution in other parts of this country simply does not advance respect for the law.⁷

In considering the need for rehabilitation, 18 U.S.C. § 3582(a) provides that "imprisonment is not an appropriate means of promoting correction and rehabilitation." See also United States v. Tapia, --- U.S. ---, 131 S.Ct. 2382 (2011). Indeed, Mr. Filippi is not a violent offender or someone who would benefit from an extensive regimen of rehabilitative programming by the prison system. As the attached letters demonstrate, he is a well-regarded, trusted, and loved member of his family and his circle of friends. He is a completely non-violent and non-predatory individual, and a lengthy term of incarceration is completely unnecessary to "rehabilitate" him. Indeed, if he were a younger and/or more impressionable person, then it is submitted that the harsh custodial punishment required by § 841(b)(1)(B) would be more likely to have the opposite effect. See Valerie Wright, Sentencing Project,

⁶ See Deputy Attorney General James M. Cole, Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement, Aug. 29, 2013, available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. See also Timothy Egan, Lock 'Em Up Nation, N.Y. Times (June 26, 2014) ("Astonishingly, in our current toxic political atmosphere, Republicans and Democrats joined together last month to vote, by 219 to 189, to block spending for federal prosecution of medical marijuana in states that allow it.").

⁷ See United States v. Bannister, 786 F. Supp. 2d 617, 660 (E.D.N.Y. 2011) (Weinstein, J.):

'[K]nowledge of systematic injustice produced by the criminal justice system . . . can have a range of deleterious effects on people's attitudes and behavior. People are less likely to comply with laws they perceive to be unjust. They may also be less likely to comply with the law in general when they perceive the criminal justice system to cause injustice.'

(quoting Paul H. Robinson, et al., The Disutility of Injustice, 85 N.Y.U. L. Rev. 1940, 2016 (2010)).

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Deterrence in Criminal Justice: Evaluating Certainty v. Severity of Punishment, (2010), available at (noting that "when prisoners serve longer sentences they are more likely to become institutionalized, lose pro-social contacts in the community, and become removed from legitimate opportunities, all of which promote recidivism.") (citing Thomas Orsagh and Jong-Rong Chen, The Effect of Time Served on Recidivism: An Interdisciplinary Theory, 4 Journ. Quant. Criminology 155 (1988)).

Insofar as deterrence is concerned, it should be emphasized that people (and their state and local taxing governments) across the country are currently making legal money hand over fist by doing the exact same thing that Mr. Filippi will now spend at least half a decade in prison for doing. As noted above, the Department of Justice is not prosecuting people in Colorado and Washington for manufacturing, distributing, possessing, and consuming recreational marijuana. It cannot seriously be contended that anyone will be deterred from producing marijuana as a result of this case, and when Mr. Filippi is released from prison there is a good chance that the conduct for which he will have served a half-decade in prison will be legal in the majority of states, perhaps even in New York.

Furthermore, those who study the deterrent effects of criminal punishment note that it is the *certainty* of punishment, and not the *severity* of punishment, that is most effective in deterring crime.⁸ Indeed:

there is little evidence of a specific deterrent effect arising from the experience of imprisonment compared with the experience of noncustodial sanctions such as probation. Instead, the evidence suggests that reoffending is either unaffected or increased. * * *
[I]t is clear that lengthy prison sentences cannot be

⁸ See Raymond Paternoster, How Much Do We Really Know About Criminal Deterrence, 100 Journ. Crim. Law & Criminology 765 (2010); Daniel S. Nagin & Greg Pogarsky, Integrating Clerity, Impulsivity, and Extralegal Sanction Threats Into a Model of General Deterrence: Theory and Evidence, 39 Criminology 865 (2001).

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justified on a deterrence-based, crime prevention basis.

Daniel S. Nagin, Deterrence in the Twenty-First Century, 42 Crime & Just. 199, 201-02 (2013). Thus, the selective prosecution of certain non-violent marijuana producers, involving charging decisions that will cost the occasional offender a half-decade of his life or more in prison, will do absolutely nothing to promote general deterrence. See also Bannister, 786 F. Supp. 2d at 660 ("General deterrence particularly may be impaired when the perceived injustice of punishment damages the credibility of the justice system.").

Incapacitation by way of a harsh prison sentence will also fail to provide a benefit to society in this case. While a lengthy prison sentence will certainly exacerbate the emotional and financial hardships Mr. Filippi and his family have faced in recent years, the legal and illegal markets for marijuana in New York and in the rest of the U.S. will not likely be affected at all by his imprisonment. Thus, incapacitating him for a lengthy period of time will advance no penological or societal good whatsoever.

Finally, we are left with the goal of "retribution," the one aspect of criminal sentencing that is entirely unconcerned with preventing future criminal activity. As Judge Weinstein has written of the retribution goal in cases involving drug offenders:

[T]he moral burden for drug use is borne primarily by the users themselves. Putting aside cases where users become helplessly addicted as children, drug habits are generally the product of voluntary choices. The notion of the drug pusher preying upon defenseless, sober individuals, coercing them to sample addictive drugs so that they may become lifelong customers, has little congruence with reality as observed in court.

Bannister, 786 F. Supp. 2d at 669. This is true with regard to illicit substances more generally, and when it comes to marijuana--which is now a legal source of tax revenue for medicinal and/or recreational use in a substantial portion of the United States--it is somewhat difficult to believe

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that the offense of marijuana cultivation requires the extent of retribution called for by the applicable mandatory minimum sentence, much less the range of prison sentences recommended by the probation department's proffered Federal Sentencing Guidelines calculation.

V. Conclusion

An excessive sentence of imprisonment will not advance any legitimate goal of criminal sentencing, and the instant prosecution under a statute that imposes a mandatory minimum sentence of five years will not benefit society in any way. Rather, it will add to the incredible quantity of resources that our country spends on the counterproductive long-term warehousing of non-violent offenders,⁹ and it will needlessly remove Mr. Filippi from his family and his friends for at least half a decade.

It seems likely that there will come a time, possibly before Mr. Filippi has completed his prison sentence, when our society and our prosecuting authorities will overwhelmingly regard the application of harsh mandatory minimum sentences to marijuana cultivation crimes as a harmful vestige of a more unenlightened time. The analogy to the repeal of prohibition in 1933 is illustrative. There are better, more proportionate and more just ways of punishing knowing violations of the law, but those options are unfortunately not available to the Court in this case.

Therefore, in light of the factors discussed in this letter and in comments to be made at the time of sentencing, it is respectfully submitted that Mr. Filippi be sentenced to a term of five years' imprisonment, a reasonable period of post-release supervision, and a special assessment of \$200.

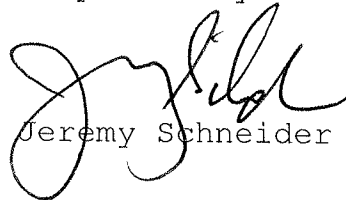
⁹ Last week, in a speech given in the Brooklyn courthouse of the U.S. District Court for the Eastern District of New York, Attorney General Eric Holder stated that "[w]e will never as a nation be able to incarcerate ourselves to better outcomes, a stronger nation or brighter futures." See Andrew Keshner, Holder Endorses Eastern District Alternatives to Prison, New York Law Journal (Oct. 31, 2014), available at <http://www.newyorklawjournal.com/id=1202675146471/Holder-Endorses-Eastern-District-Alternatives-to-Prison?slreturn=20141003102307>.

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With respect to the conditions of confinement, it is respectfully requested that Your Honor recommend to the Bureau of Prisons that Mr. Filippi be designated to the minimum security satellite camp at FCI Otisville, or, in the alternative, to any other camp as close to the New York City metropolitan area as possible.

Finally, in light of the fact that Mr. Filippi has no assets and is in substantial debt, and in light of the fact that I was Mr. Filippi's counsel during both trials in this matter, it is respectfully requested that I and my associate, Lucas Anderson, be assigned as CJA counsel for Mr. Filippi's appeal.

Respectfully submitted,



Jeremy Schneider

JS/la

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November 6, 2014

Honorable Sandra L. Townes
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *United States v. Ahmed*, et al. 12 CR 661 (S1) (SLT)

Dear Judge Townes:

This letter is respectfully submitted on behalf of all the defendants to address recent developments in the case in connection with defendants' pending motions to suppress.

In a letter dated November 4, 2014, the government advised that it was withdrawing its request to conduct "hearing depositions in the Seychelles" and that it no longer intends to call to testify at a hearing on the suppression motions any of the witnesses it had previously identified "as the government does not intend to offer the statements that the defendants seek to suppress in its case-in-chief at trial."

The government's revelations raise several issues. To put the issues in context, we set forth a brief review of previous submissions.

In mid-September, the defendants moved to suppress both statements *and the fruits of those statements* on the grounds that (1) the statements were *involuntary* and the product of torture, and (2) they were the tainted fruits of illegal arrests.¹

On October 3, 2014, the government, acknowledging that it had the burden of proof, submitted that, at a hearing, it would establish both the voluntariness of the statements and the legality of the defendants' arrests "through the testimony of multiple witnesses with first-hand knowledge of the defendants' detention and overseas interrogation." (Ecf 105).

¹ See *United States v. Pena*, 961 F.2d 333, 338 (2d Cir. 1992) ("The court's resolution of the *Miranda* issue, however, does not preclude a determination that Pena's statements were nonetheless the 'fruit' of a prior illegal arrest, see *Brown v. Illinois*, 422 U.S. 590, 600-05, 45 L. Ed. 2d 416, 95 S. Ct. 2254 (1975),... and thus inadmissible.")

On October 15, 2014, the government elaborated that, at the anticipated hearing on the motions to suppress, it intended to prove that the defendants' statements were voluntary and admissible at trial with testimony from three groups of witnesses: (1) "FBI agents and other U.S. government representatives;" (2) several unidentified "representatives of a foreign government" who are located abroad and "unavailable as witnesses in the United States"; and (3) "at least one [unidentified] foreign civilian witness who is located abroad and may also be unavailable as a witness in the United States." (Ecf 106)

With respect to the second group -- the unidentified representatives of the unidentified foreign government -- the government moved to offer their testimony by deposition pursuant to Rule 15, and (without having conferred with counsel for the defendants) sought an order from the Court directing that the depositions take place (at an unknown location) on November 17-21. In a footnote, the government also advised of the separate issue that certain persons it intended to call as witnesses *at trial* might also be unavailable to testify in the United States, and that, "should it prove necessary," the government would "provide additional notice pursuant to Rule 15 for any such witnesses." (Id.)

Defendants opposed the government's Rule 15 motion on several grounds by letter dated October 21, 2014, including that the government failed to comply with the notice requirements of the rule, and failed to adequately show materiality of the anticipated testimony or unavailability of the witnesses. (Ecf 110)

In response, the government provided some additional information about four "representatives of a foreign government" whom it sought to depose. Still not providing their names or addresses, the government represented that these individuals "personally conducted interviews and provided care for the defendants while they were in Djiboutian custody in 2012." The government also stated that it intended to call "approximately six additional witnesses to testify" in the EDNY in connection with the pending suppression motions. (Ecf 112)

On October 28, 2014, the government provided more information regarding potential witnesses whose testimony it intended to offer in connection with the pending motions to suppress, and the dates it would either offer the testimony in court or take deposition abroad. As for the "representatives of a foreign government", the government advised it intended to "hold hearing depositions in the Seychelles on January 12-15, 2015." (Ecf 113)

As for in-court witnesses, the government first identified FBI Special Agent Bomb Technician Brian Hayes (who, it said, "had occasion to observe the defendants in custody shortly after their capture overseas"). The prosecutors announced that they intended to offer Hayes' testimony on November 7 (when the parties were before the court for argument on the Rule 15 application) and would disclose the witness's 3500 material to the defense "imminently." The government also referenced four other witnesses -- all U.S. government agents or employees -- whose testimony, it said, it intended to elicit "beginning on December 5, 2014." It said that three of these individuals (an unnamed Department of Defense ("DOD") investigator, FBI Special Agent Matthew Dowd, and Navy Criminal Investigative Service Special Agent Andrew

Finley) were “involved in intelligence interviews” of one or all of the defendants; it said the fourth – an unnamed physician’s assistant employed by the DOD – “examined all of the defendants.” The government also indicated it might call “additional witnesses” on the “available dates in December,” and promised to provide notice of when their availability was confirmed. In addition, the government stated its intent to call two other “law enforcement witnesses” – Special Agents Phillip Swabsin and Stefanie Roddy – “on a date to be determined in January 2015.” (Id.)

In addition to discussing witnesses it identified as relevant to the pending suppression motions, the government also made mention of “one cooperating witness in Kampala, Uganda.” Without having made a separate Rule 15 motion for trial testimony, and, again without providing any of the notice required by Rule 15, the government simply declared that, after it conducted the “hearing depositions” in the Seychelles, it “expects to hold a trial deposition for one cooperating witness in Kampala, Uganda, beginning as soon as practicable thereafter.” The government said it was confirming the witness’s availability with the Ugandan government and assured it would “advise the Court and counsel of the exact timing of that deposition as soon as the witness’s availability had been confirmed.” (Id.)

In a turn around, the government wrote on November 4, 2014, that (while “it continues to seek to offer deposition evidence at trial pursuant to Rule 15 ..., specifically the testimony of a cooperating witness located in Kampala, Uganda,” and “anticipates holding the Rule 15 trial deposition in Kampala, Uganda, beginning at a time and place identified by the Ugandan government” during the week of January 12, 2015), it was withdrawing its request to conduct hearing depositions in the Seychelles. Not only this, but it notified the Court and counsel that it no longer intends to call “in connection with any hearing on the defendants’ motion to suppress statements” any of the numerous witnesses it had identified in its October 28 letter. (Ecf 122)

Apparently, the government’s view is that a suppression hearing is no longer necessary “as the government does not intend to offer the statements that the defendants seek to suppress in its case-in-chief at trial.” (Id.)

We welcome the government’s decision to waive the presentation of evidence at a hearing and its decision not to dispute the sworn statements supporting the defendants’ motions to suppress. However, to the extent that the government is suggesting that, notwithstanding this waiver, the door will still be open for it to use the defendants’ statements in cross-examination of the defendants should they choose to testify at trial, the government is mistaken.

Defendants moved to suppress their statements and the fruits of those statements on the grounds that the statements were the product of torture and coercion. The motion was not limited to the government’s use of the statements in its direct case.

Under 18 U.S.C. § 3501, a confession is admissible in evidence *only* if it is voluntarily given. If a confession is not voluntary, it may not be used for any purpose. It may not be used in the government’s case in chief, and it may not be used for impeachment. *Mincey v. Arizona*, 437 US 385, 397-8 (1978) (“Statements made by a defendant in circumstances violating the strictures of *Miranda v. Arizona*, *supra*, are admissible for impeachment if their ‘trustworthiness . . .

satisfies legal standards.’ But *any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law ‘even though there is ample evidence aside from the confession to support the conviction.’ ... If, therefore, Mincey’s statements to Detective Hust were not “‘the product of a rational intellect and a free will,’” his conviction cannot stand.”) (Citations omitted.) Similarly, Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (to which the U.S. is a party) sets forth an unconditional ban on the use of any statement made as a result of torture as evidence in any proceedings.

A motion to suppress evidence pursuant to Rule 12(b)(3)(C), Fed. R. Crim. P., must be made before trial, and, once made, the defendants and their counsel should know before trial whether the defendants’ statements are admissible. Indeed, the whole trial strategy of the defendants may be effected by the court’s ruling-- from opening statements, to decisions about how the government’s witnesses should be cross-examined, to the advice and decision as to whether the defendants should testify, the experts the defense calls, and the witnesses it prepares. There are also substantial practical consequences if the determination as to voluntariness is deferred until the close of the government’s case: the trial would have to come to a halt so that then, instead of now, foreign depositions that (as the government has made clear) are logistically difficult to plan can be conducted, and all the other people with first-hand knowledge of the facts relevant to the voluntariness/torture issue can be examined.

Not ruling on the motion to suppress now, and leaving open the questions whether the statements were involuntary (and the related question whether the government can use the statements to cross-examine the defendants should they choose to testify) would not serve the interests of justice. To the contrary, it would be highly unfair to the defendants and potentially disruptive to the trial.

We, therefore, seek an order not only granting the motion to suppress, but also, given the government’s waiver of a hearing to determine the issue of voluntariness before trial specifically precluding the government from using the statements -- or the fruits of those statements --for any purpose including cross-examination of the defendants should they testify.

Related to the issue of “fruits”, we respectfully submit that the court must now conduct a taint hearing at which the government bears the burden of demonstrating that the evidence it seeks to introduce at trial is not the product of either the illegal interrogation or the illegal arrest; in other words, the government must show it did not come by the evidence by way of any of the defendants’ statements to either the Djiboutians, U.S. intelligence officers, or the FBI (and by evidence we include any testimony from any witness whose identity and/or connection to the defendants was ascertained as a result of the unlawful interrogations including, but not limited to, the mystery witness in Kampala, Uganda, whose deposition we address below). The determination to be made involves asking whether “granting the establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” *Wong Sun v. United States*, 371 U.S. 471, 488 (1965) (citations omitted).

In various reports, the government has made a point of suggesting that the FBI agents who interviewed the defendants in September of 2012 were insulated from the information obtained either by the Djiboutian officials who tortured the defendants or by U.S. officials who conducted pre-*Miranda* “intelligence interviews” in August 2012. If true, this might have been relevant to the question of whether the FBI agents used any information that was gleaned from the defendants during the earlier interrogations when they interrogated the defendants in September. It does not tell us anything about whether or not the fruits of the earlier interrogations were exploited by the government to obtain additional evidence against the defendants. There is nothing in the record one way or the other that clarifies whether or not the earlier sets of interviews were used by the government to develop additional evidence or to track down additional witnesses. What we do know, however, is that there were at least two FBI agents -- FBI Special Agent Bomb Technician Brian Hayes and FBI Special Agent Matthew Dowd -- on the scene in Djibouti from the outset, and that, ultimately, the prosecution obtained reports of the earlier interrogations that include numerous references to many other individuals -- who may or may not be now “cooperating” with the government.

The government has conceded that it presented the defendants’ statements to the grand jury and that the grand jury returned the indictment “[b]ased in part on the defendants’ admissions to the FBI.” (Ecf 103) Accordingly, in addition to a taint hearing, we move pursuant to Rule 6(3)(E)(ii), Fed. R. Crim.P. for disclosure of the grand jury minutes as a prelude to a potential motion to dismiss the indictment on the ground that the fruits of the unlawful arrests and interrogations of the defendants were presented to the grand jury, and that, without these tainted fruits, there would not have been a sufficient basis to return the indictment. See *United States v. Carson*, 969 F.2d 1480, 1500 (3d Cir. 1992) (Court recognizes that, if fruits of unlawful electronic surveillance were presented to the grand jury and were relied upon by the grand jury in returning the indictment, this would provide a ground for dismissing the indictment).

With respect to the government’s stated intention to take a “trial deposition” of an unidentified “cooperating witness” in Uganda some time in January, we make the same objections that we made to the government’s initial Rule 15 motion. (The objections were stated in our October 21, 2014 letter, ecf 110, and, rather than prolong this submission, we incorporate that letter by reference.) The government’s latest statement of intent is deficient for all the same reasons its October 15, 2014 Rule 15 letter motion was deficient: among other things, the government has failed to disclose the witness’s name and address, or the specific location and date of the deposition, and it has made no showing that the anticipated testimony is material or that the witness is unavailable. All of these particulars are essential before the court can make any findings necessary to approve a foreign deposition of this witness under Rule 15.

Respectfully submitted,

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cc: All AUSAs of record by email